

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LION RAISINS, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant.

1:05-CV-00062 OWW-SMS

MEMORANDUM DECISION RE DENYING
MOTION FOR RELIEF FROM
JUDGMENT (DOC. 53)

1. INTRODUCTION

Plaintiff Lion Raisins, Inc. ("Lion") moves the Court pursuant to Rule 60(b)(5) and 60(b)(6) of the Federal Rules of Civil Procedure for relief, due to changed circumstances, from the summary judgment order entered on October 20, 2005 in favor of Defendant United States Department of Agriculture ("USDA"). Lion alleges that the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires USDA to provide the Worksheets that Lion requested for the period from January 1995 to December 2000 and now seeks an order for the USDA to release copies of the Worksheets to Lion and allow physical access to inspect the originals. The matter was heard on February 25, 2008.

United States District Judge Robert E. Coyle previously upheld in a summary judgment order the USDA's FOIA Exemption claim, under 5 U.S.C. § 552(b)(7)(A), on the basis that the

1 disclosure of worksheets sought by Plaintiff could reasonably be
2 expected to interfere with the administrative enforcement
3 proceedings. The Ninth Circuit Court of Appeals upheld that
4 Court's decision in Case No. 05-17449. On September 20, 2007
5 Plaintiff submitted another FOIA request to the USDA to release
6 copies of Worksheets from January 1995 through December 2000.
7 Lion seeks relief in this motion from the Court's summary
8 judgment order of October 20, 2005.

9 2. PROCEDURAL BACKGROUND

10 In January 2001, USDA issued an administrative complaint
11 (Complaint 1) alleging that Lion and its principals, officers,
12 agents and affiliates had falsified and misrepresented USDA
13 Certificates of Quality and Condition in violation of the
14 Agricultural Marketing Act ("AMA") and the USDA's inspection and
15 certification regulations. USDA later issued two additional
16 administrative complaints against Lion (Complaint 2 and 3). USDA
17 asserted that Lion established a procedure whereby Lion's
18 shipping department employees would falsify or fabricate USDA
19 Certificates to conform to customer specifications.

20 By letter dated May 13, 2004, Lion submitted a FOIA request
21 seeking all USDA Certificate of Quality and Condition for Raisins
22 Worksheets issued or prepared by the USDA for product inspected
23 at Lion during the period January 1995 to December 2000. By
24 letter dated June 23, 2004, the FOIA Officer responded to the
25 request and withheld the requested documents. Lion's
26 administrative appeal was denied on January 3, 2005.

27 On January 11, 2005, Lion filed this action in federal court
28 seeking declaratory and injunctive relief under FOIA. (Doc. 1,

1 Complaint) The parties filed cross-motions for summary judgment.
2 (Doc. 18 USDA MSJ and Doc. 23 Lion MSJ) On October 19, 2005, the
3 Court entered its Order denying Lion's motion for summary
4 judgment and granting USDA's motion for summary judgment. (Doc.
5 46, Order) Judgment was entered in accordance with the Order on
6 October 20, 2005. (Doc. 47, Judgment) Lion appealed, and on
7 April 30, 2007, the Court of Appeals entered its order affirming
8 the judgment of the District Court.

9 Lion then filed the present motion for relief from judgment
10 under Rule 60(b)(5) and (6) on September 24, 2007. (Doc. 53,
11 Motion) USDA filed an opposition to Lion's Motion on November
12 20, 2007, (Doc. 60, Opposition), and Lion filed its reply to
13 USDA's Opposition on December 3, 2007. (Doc. 61, Reply)

14 3. FACTUAL HISTORY

15 This case concerns FOIA requests by Lion that the USDA
16 denied, citing ongoing administrative proceedings against Lion.
17 A summary judgment order was entered in favor of USDA on the
18 basis of FOIA Exemption 7A, due to concerns that disclosure could
19 reasonably be expected to interfere with the administrative
20 enforcement proceedings. The Ninth Circuit Court of Appeals
21 affirmed the District Court decision on appeal.

22 Lion and USDA have been involved in administrative
23 proceedings since 1998, when the Agricultural Marketing Service
24 (hereinafter referred to as "AMS") initiated an investigation of
25 Lion after receiving an anonymous complaint regarding Lion. The
26 proceedings stem from USDA's allegations that representatives of
27 Lion forged signatures of USDA inspectors or recorded false
28 moisture readings on inspection certificates for Lion's fruit.

1 USDA alleges that Bruce Lion, an officer and director of Lion
2 Raisins, instituted a procedure for falsifying or fabricating
3 USDA certificates to conform to customer specifications. The
4 fabricated certificates, USDA alleges, were then sent to foreign
5 customers. After completing its investigative report on May 26,
6 1999, the USDA filed three separate administrative complaints
7 against Lion.

8 On January 12, 2001, USDA suspended Lion's eligibility for
9 government contracts and filed an administrative complaint (I&G
10 Docket Number 01-0001) (Complaint 1) that sought to "debar"
11 future inspections of Lion's facilities. Two additional
12 administrative complaints (I&G Docket Numbers 03-0001 (Complaint
13 2) and 04-0001 (Complaint 3) were also issued against Lion.

14 Lion is the largest independent handler of raisins produced
15 in California. It handles and packs raisins produced by outside
16 growers and by Lion and its affiliates. Lion is governed by the
17 Agricultural Marketing Act of 1937 (7 U.S.C. §§ 601-627) and a
18 "marketing order" promulgated thereunder that governs raisins
19 produced from grapes grown in California (7 C.F.R. §§
20 989.1-989.801). The marketing order calls for an inspection
21 process under which a handler must have USDA inspect its products
22 once when they are received from the producer and again before
23 they are sold to the producer. 7 C.F.R. §§ 989.58-989.59. The
24 AMS is charged with the administration of the inspection
25 regulations and provides inspection and grading services to
26 applicants. The inspections entail USDA inspectors periodically
27 taking samples from handlers' processing lines to assess the
28 quality of the raisins in various categories, such as weight,

1 color, size, sugar content, and moisture.

2 The inspection process generates a variety of paperwork. A
3 USDA inspector completes a "Line Check Sheet" based on his or her
4 observations and assigns grades to the raisins. The inspector
5 then prepares a Certificate of Quality and Condition for Raisins
6 Worksheet ("Worksheet") that serves as a draft for the official
7 Certificate of Quality and Condition ("Official Certificate"),
8 also known as form FV-146, and gives the Worksheet to an employee
9 of the packer. At Lion the Worksheet is given to a shipping
10 department employee. The employee's task is to type the Official
11 Certificate based on the information on the Worksheet. The
12 employee next returns the Official Certificate and Worksheet to
13 the USDA grader. If the grader reviewing the Official
14 Certificate determines that it has been correctly prepared, it is
15 signed and the original, as well as up to four carbon copies of
16 the Official Certificate are returned to Lion. USDA did not
17 return the Worksheets to Lion. From time to time, USDA officials
18 inspecting Lion's raisins, voided an Official Certificate and had
19 a new one typed. USDA then provided a copy of the new Official
20 Certificate to Lion. USDA retained the voided Official
21 Certificate ("Voided Certificate") and did not at that time
22 provide a copy to Lion.

23 In a letter dated May 13, 2004, Lion requested, under FOIA,
24 any and all USDA Certificate of Quality and Condition for Raisins
25 Worksheets, issued or prepared by USDA for product inspected at
26 Lion, during the period of January 1995 to December 2000. USDA
27 responded by withholding the requested documents pursuant to 5
28 U.S.C. § 552(b) (7) (A). Lion appealed in a July 12, 2004 letter.

1 The decision was upheld in a letter dated January 3, 2005. On
2 January 11, 2005, Lion filed its Complaint in this case for
3 declaratory and injunctive relief of USDA's decision to withhold
4 the Worksheets. On October 20, 2005, United States District
5 Judge Robert E. Coyle determined disclosure could reasonably
6 interfere with the administrative enforcement proceedings and
7 granted summary judgment in favor of the USDA. Lion appealed the
8 decision and on April 30, 2007 the Ninth Circuit Court of Appeals
9 affirmed the District Court decision.

10 Plaintiff now contends the taking of evidence closed on
11 March 31, 2006, in the administrative hearings of Complaint 1 and
12 on February 28, 2006 on Complaint 3. USDA however contends that
13 each of the three enforcement actions against Lion continue as
14 pending proceedings.

15 On September 20, 2007 Lion submitted another FOIA request
16 for the USDA to release copies of Worksheets from January 1995
17 through December 2000 and provide access to the originals.
18 Neither party has provided any information on the status of this
19 September 20, 2007 FOIA request.

20 On September 24, 2007 Lion filed its motion for relief from
21 judgment of the October 20, 2005 Summary Judgment Order issued by
22 Judge Coyle and affirmed by the Ninth Circuit on April 30, 2007.

23 4. STANDARD OF REVIEW

24 A. Motion for Relief from Judgment

25 Lion moves the Court for relief from judgment under Rule
26 60(b)(5) and Rule 60(b)(6) of the Federal Rules of Civil
27 Procedure. See Motion, p. 1. Rule 60 of the Federal Rules of
28 Civil Procedure provides a means of altering a judgment in

1 limited circumstances. *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th
2 Cir. 2007).

3 Rule 60(b) provides in relevant part:

4 Grounds for Relief from a Final Judgment, Order, or
5 Proceeding. On motion and just terms, the court may
6 relieve a party or its legal representative from a
final judgment, order, or proceeding for the following
reasons:

7 (5) the judgment has been satisfied, released or
8 discharged; it is based on an earlier judgment that
9 has been reversed or vacated; or applying it
prospectively is no longer equitable; or

10 (6) any other reason that justifies relief.

11 Fed. R. Civ. P. 60(b) (5) and 60(b) (6).

12 "Rule 60 regulates the procedures by which a party may
13 obtain relief from a final judgment.... The rule attempts to
14 strike a proper balance between the conflicting principles that
15 litigation must be brought to an end and that justice should be
16 done." 11 Charles Alan Wright and Andrew D. Liepold, *Federal*
17 *Practice and Procedure* § 2851 (4th ed. 2008). A motion under
18 Rule 60(b) must be made within a reasonable time. Fed. R. Civ.
19 P. 60(c).¹

20 5. DISCUSSION

21 A. Evidentiary Objections

22 Plaintiff requests pursuant to Federal Rules of Evidence
23 201(b), judicial notice of the following filings by Lion in the

24
25 ¹ The only limitations are that if a Rule 60(b) motion is
26 made pursuant to subsection (1), (2) or (3) the motion must be
27 made no more than a year after the entry of judgment or order or
28 the date of the proceedings. Plaintiff is not bringing a Rule
60(b) motion under these subsections, therefore the
reasonableness standard applies here. Fed. R. Civ. P. 60(c).

1 administrative hearing for Lion's Petition to Reopen Hearing in
2 I&G Docket No. 01-0001 (Complaint 1): Petition to Reopen Hearing,
3 attached as Exhibit "A" to Lion's Request for Judicial Notice of
4 Exhibits (Doc. 64, Lion's Judicial Notice Request); Supplemental
5 to Petition to Reopen the Hearing, attached as Exhibit "B" to
6 Lion's Judicial Notice Request; Second Supplemental to Petition
7 to Reopen the Hearing, attached as Exhibit "C" to Lion's Judicial
8 Notice Request; Third Supplemental to Petition to Reopen Hearing,
9 attached as Exhibit "D" to Lion's Judicial Notice Request; Fourth
10 Supplemental to Petition to Reopen the Hearing, attached as
11 Exhibit "E" to Lion's Judicial Notice Request; and Amended Fourth
12 Supplemental to Reopen the Hearing, attached as Exhibit "F" to
13 Lion's Judicial Notice Request.

14 Defendant USDA filed no opposition to Lion's Judicial Notice
15 Request. "A judicially noticed fact must be one not subject to
16 reasonable dispute in that it is either (1) generally known
17 within the territorial jurisdiction of the trial court or (2)
18 capable of accurate and ready determination by resort to sources
19 whose accuracy cannot reasonably be questioned." Fed. R. Evid.
20 201(b). "A court shall take judicial notice if requested by a
21 party and supplied with the necessary information." Fed. R.
22 Evid. 201(d). Judicially noticed facts often consist of matters
23 of public record, such as prior court proceedings, *see, e.g.,*
24 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988);
25 administrative materials, *see, e.g., Barron v. Reich*, 13 F.3d
26 1370, 1377 (9th Cir. 1994); city ordinances, *see, e.g., Toney v.*
27 *Burris*, 829 F.2d 622, 626-27 (7th Cir. 1987) (holding that
28 federal courts may take judicial notice of city ordinances);

1 official maps, see, e.g., *Aiello v. Town of Brookhaven*, 136 F.
2 Supp. 2d 81, 86 n.8 (E.D.N.Y. 2001) (taking judicial notice of
3 geological surveys and existing land use maps); or other court
4 documents, see, e.g., *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir.
5 2000) (taking judicial notice of a filed complaint as a public
6 record). Federal courts may "take notice of proceedings in other
7 courts, both within and without the federal judicial system, if
8 those proceedings have a direct relation to matters at issue."
9 *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*,
10 971 F.2d 244, 248 (9th Cir. 1992), quoting *St. Louis Baptist*
11 *Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir.1979).

12 Exhibits A and B contain a USDA "RECEIVED" date stamp
13 acknowledging receipt and filing by a public agency. Exhibit B,
14 C, D, E and F contain no such stamp or other identifying mark
15 indicating they were filed with the USDA. Nor are they certified
16 as true copies of publically filed documents. See Fed. R. Evid.
17 1005. The Court takes judicial notice of the fact of filing of
18 Exhibits A and B, and DENIES Lion's request for judicial notice
19 of Exhibit B, C, D, E and F, as unauthenticated and containing
20 subject matter that is not reasonably undisputed.

21 B. Motion for Relief from Judgment

22 Plaintiff moves for relief from the October 20, 2005 Summary
23 Judgment Order which denied Lion's FOIA request on the basis of
24 Exemption 7(A) for a pending administrative enforcement. Under
25 FOIA 7(A) exemption: an agency need not disclose "records or
26 information compiled for law enforcement purposes, but only to
27 the extent that the production of such law enforcement records or
28 information (A) could reasonably be expected to interfere with

1 enforcement proceedings..." 5 U.S.C. § 552(b)(7)(A). In a suit
2 asserting an Exemption 7(A), the government must show that one, a
3 law enforcement proceeding is pending or prospective, and two,
4 release of the information could reasonably be expected to cause
5 some articulable harm. See *N.L.R.B. v. Robbins Tire & Rubber*,
6 437 U.S. 214, 224 (1978). Lion claims that the justification for
7 any discretionary claim of exemption has now materially changed
8 because taking of evidence at any administrative hearing has been
9 completed and the statute of limitations has run on any further
10 civil enforcement. Lion also alleges that it has submitted a new
11 FOIA request for access to original and copies of the Worksheets
12 in question. Lion seeks an Order from the Court to require USDA
13 to release copies of the Worksheets to Lion and allow physical
14 access by Lion under protective conditions to inspect the
15 originals.

16 I. 60(b)(5) Relief

17 Lion moves for reconsideration under Rule 60(b)(5). In
18 addressing Lion's request for relief from the October 20, 2005
19 Summary Judgment Order (2005 Order) denying Lion's FOIA request,
20 the Order is not prospective and therefore no relief can be
21 afforded under Rule 60(b)(5). Rule 60(b)(5) provides that the
22 court may relieve a party from a final judgment when "the
23 judgment has been satisfied, released, or discharged or a prior
24 judgment upon which it is based has been reversed or otherwise
25 vacated, or it is no longer equitable that the judgment should
26 have prospective application." Plaintiff argues it is no longer
27 equitable that the 2005 Order have a prospective application.

28 The 2005 Order does not have "prospective" application. To

1 have "prospective application" the order under Rule 60(b)(5) must
2 be "executory" or involve the "supervision of changing conduct or
3 conditions." *Twelve John Does v. District of Columbia*, 841 F.2d
4 1133, 1139 (D.D.C. 1988). In addition, the moving party must
5 establish that it is suffering hardship so extreme and unexpected
6 that it constitutes oppression. *Elser v. I.A.M. Nat. Pension*
7 *Fund*, 579 F.Supp. 1375, 1382 (C.D.Cal. 1984). The *Elser* court
8 also noted that a strong showing is required and many actions for
9 relief on this ground are denied. *Id.*

10 The 2005 Order denied a specific FOIA request for
11 information by Plaintiff. The order was affirmed on appeal and
12 is final. No supervision of the October 20, 2005 Order has been
13 required, nor will any supervision be required in the future.
14 The October 20, 2005 Order has no "prospective application", it
15 was a one time request for release of information under FOIA that
16 was denied. "Virtually every court order causes at least some
17 reverberations into the future, and has, in that literal sense,
18 some prospective effect ... That a court's action has continuing
19 consequences, however, does not necessarily mean that it has
20 'prospective application' for the purposes of Rule 60(b)(5)."
21 *Twelve John Does*, 841 F.2d at 1138. "Any continuing injunction,
22 for example, would have the requisite prospective effect." *Cook*
23 *v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980) "Rule
24 60(b)(5) is routinely used to challenge the continued validity of
25 consent decrees, which courts often liken to contracts."
26 *Bellevue Manor Associates v. U.S.*, 165 F.3d 1249, 1253 (9th Cir.
27 1999) Courts typically apply the rule in "private" cases. *Id.*
28 (citing a Seventh Circuit case upholding under Rule 60(b)(5) the

1 dissolution of an injunction prohibiting a competitor from
2 serving as a corporation's director). None of these incidents
3 apply. The order is prohibitory and resolved a dispute over the
4 accessibility of documents.

5 Rule 60(b)(5) does not afford relief.

6 II. Motion for Relief From Judgment Pursuant to FRCP
7 60(b)(6)

8 Plaintiff also moves for reconsideration under Rule
9 60(b)(6). Relief under Rule 60(b)(6) is only appropriate under
10 "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524,
11 535 (2006). Rule 60(b)(6) is to be used "sparingly [and] as an
12 equitable remedy to prevent manifest injustice." *United States*
13 *v. Alpine Land & Reservoir Co*, 984 F.2d 1047, 1049 (9th Cir.
14 1993). "60(b) motions are addressed to the sound discretion of
15 the district court." *Martella v. Marine Cooks and Stewards*
16 *Union, Seafarers Intern. Union of North America*, 448 F.2d 729,
17 730 (9th Cir. 1971). Plaintiff Lion does not identify any
18 extraordinary circumstances or manifest injustice to warrant
19 relief under the "catch-all" provision, Rule 60(b)(6).

20 "The Rule 60(b)(6) 'catch-all' provision ... applies only
21 when the reason for granting relief is not covered by any of the
22 other reasons set forth in Rule 60." *Delay v. Gordon*, 475 F.3d
23 1039, 1044 (9th Cir. 2007) The fact that Plaintiff Lion has the
24 ability to file a new FOIA request based on the current
25 conditions before the USDA demonstrates lack of extraordinary
26 circumstances. Plaintiff cites no analogous cases affording
27 relief under Rule 60(b)(6) from judgment denying a FOIA request
28 based on exemption 7(A). Rule 60(b) motions are not vehicles for

1 parties to present known existing evidence that could have been
2 presented prior to time of judgment or decision making.
3 Plaintiff cites, without analysis, several cases for the
4 proposition that the although Rule 60(b)(6) should be used
5 sparingly, it applies when the FOIA requester presents compelling
6 evidence of agency misconduct under a "reasonable person
7 standard." A review of the cases does not provide support for
8 Plaintiff's 60(b)(6) motion for relief from Judgment.

9 *Computer Professionals for Social Responsibility v. U.S.*
10 *Secret Service*, 72 F.3d 897 (D.D.C. 1996), involves a motion for
11 reconsideration of defendant's motion for summary judgment in a
12 FOIA suit. The suit involved a FOIA 7(D) exemption, not a 7(A)
13 exemption. The Court had originally denied the government's
14 assertion of an exemption to the FOIA request under Section
15 552(b)(7)(D). Section 552(b)(7)(D) provides an exemption where
16 it:

17 could reasonably be expected to disclose the identity
18 of a confidential source, including a State, local, or
19 foreign agency or authority or any private institution
20 which furnished information on a confidential basis,
21 and, in the case of a record or information compiled by
22 criminal law enforcement authority in the course of a
23 criminal investigation or by an agency conducting a
24 lawful national security intelligence investigation,
25 information furnished by a confidential source

26 5 U.S.C. § 552(b)(7)(D). The government in its reconsideration
27 motion argued that a 7(D) exemption applied and cited to
28 previously undisclosed information. The court on reconsideration
found this information central to finding a 7(D) exemption
applied, though noting that original failure to present
information was inexcusable. The information that was sought by
plaintiff in the suit on reconsideration was found to be obtained

1 under an expectation of confidentiality and the individual
2 providing the information had done so under such expectation.
3 This new evidence demonstrated that the initial order was
4 manifestly unjust, thus justifying reconsideration under Rule
5 60(b)(6). *Id.* at 903. *Computer Professionals* also addressed the
6 necessary public interest showing required to override privacy
7 interests protected under a FOIA 7(C) exemption. A 7(c)
8 exemption to a FOIA request authorizes the withholding of records
9 or information compiled for law enforcement purposes to the
10 extent that production of such records "could reasonably be
11 expected to constitute an unwarranted invasion of personal
12 privacy." 5 U.S.C. § 552(b)(7). This case is not applicable.

13 *Valdez v. U.S. Dept. Of Justice*, 474 F.Supp.2d 128, 133
14 (D.D.C. 2007), also cited by Plaintiff for support, fails to
15 advance its argument. In *Valdez*, the court granted summary
16 judgment for the government on the basis of the FOIA 7(C)
17 exemption, finding the public interest asserted by the plaintiff
18 failed to override the privacy interest. "Here, plaintiff merely
19 asserts that he has uncovered evidence 'suggesting massive
20 government misconduct.' His burden is much higher, however.
21 Absent 'evidence that would warrant a belief by a reasonable
22 person that the alleged Government impropriety might have
23 occurred,' he fails to demonstrate a public interest" to outweigh
24 the privacy interest. *Id.* at 133 (quoting *Nat'l Archives and*
25 *Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)).

26 Plaintiff additionally cites without explanation *Bennett v.*
27 *Drug Enforcement Admin.*, 55 F.Supp.2d 36, 42-43 (D.D.C. 1999), a
28 FOIA suit involving, not a 7(A) exemption, but a 7(C) exemption

1 to a FOIA request. The DEA argued in response to a FOIA request
2 that the payment records and the criminal history of a DEA
3 informant were exempted from a FOIA request under 7(C), invasion
4 of personal privacy. The court disagreed and found a public
5 interest in disclosing information that outweighed the privacy
6 interest because there was "compelling evidence" of government
7 misconduct. The information sought would confirm whether
8 Plaintiff's findings were "backed by the record." *Id.* at 42.
9 "[W]hen government misconduct is alleged to justify disclosure,
10 the public interest is unsubstantial without *compelling evidence*
11 that the agency is involved in illegal activity, and that the
12 information sought is necessary to confirm or refute that
13 evidence." *Id.* (emphasis added). The Court held:

14 Plaintiff and his counsel have already conducted
15 significant research on the many instances in which
16 Chambers [DEA informant] has perjured himself about his
17 criminal record, and the government's apparent
18 complacency about this conduct. The information
19 uncovered by Plaintiff is *very compelling*, suggesting
20 extensive government misconduct, and the information
21 sought is necessary to confirm whether Plaintiff's
22 findings are backed by the record. Furthermore, it is
23 clear from the far-reaching and serious consequences of
24 the activities and collaboration of Chambers and DEA
25 that there is a substantial public interest in exposing
26 any wrongdoing in which these two parties may have
27 engaged. This public interest can only be served by the
28 full disclosure of Chambers' rap-sheet, about which he
has frequently testified, although not always
truthfully, in open court around the country.
Consequently, Defendant's withholding of Chambers'
criminal record under Exemption 7(C) was improper.

Id. (emphasis added).

Plaintiff also cites *Sonds v. Huff*, 391 F.Supp.2d 152, 159
(D.D.C. 2005) which also addresses the ability to overcome a 7(C)
privacy exemption in a FOIA suit. A portion of the decision
addresses overcoming the privacy concerns under a FOIA 7(C) by a

1 larger public interest concern, similar to *Bennett* and does not
2 address a 7(A) exemption to a FOIA request.²

3 Plaintiff next cites what is considers "compelling and
4 substantial evidence of agency misconduct" by high-ranking
5 officials to support its contention that extraordinary
6 circumstances are present to grant Lion relief under its 60(b)(6)
7 motion. (Doc. 6, Reply, p. 5:8-10). Plaintiff's arguments of
8 agency misconduct to support an extraordinary circumstances
9 finding was first stated in its Reply. Defendant USDA has not
10 had the opportunity to respond to the new allegations of agency
11 misconduct.

12 First, Plaintiff contends that David W. Trykowski, Director
13 of Compliance, Safety and Security Division of the AMS, who at
14 the time of the administrative hearings was Chief of
15 Investigations for AMS and prior to that was Senior Compliance
16 Officer of the AMS, is untrustworthy and lacks credibility.
17 Plaintiff contends that Mr. Trykowski declared in 2005 he never
18 signed a Worksheet, but Plaintiff alleges that in previous
19 administrative proceedings, he submitted an exhibit that was a
20 Worksheet he signed. Plaintiff also contends that Mr. Trykowski
21 testified in an administrative proceeding in 2003 that he had
22 nothing to do with the preparation of the complaint but

23
24 ² Plaintiff also cites *American Civil Liberties Union v.*
25 *Department of Defense*, 406 F.Supp.2d 330 (S.D.N.Y. 2005), in
26 which a civil liberties group brought forward new evidence in
27 their motion for relief from judgment under 60(b)(2) and
28 60(b)(6). The government had been granted summary judgment on
Plaintiff's FOIA request. Court denied motion for relief from
judgment under 60(b)(2), and declined to rule on 60(b)(6) since
new evidence is covered under 60(b)(2).

1 allegedly, later testified in a 2005 District Court case that he
2 participated in drafting that complaint. Plaintiff also contends
3 that Mr. Trykowski stated before a District Judge in 2004 that he
4 was the lead investigator, however, allegedly in 2003 he
5 testified before the ALJ that there were no team of investigators
6 in that case. Plaintiff also argues that Mr. Trykowski gave
7 inconsistent and false testimony to the ALJ about inspection
8 procedures, practices and recording requirements. Plaintiff
9 further claims that Mr. Trykowski withheld inspection sheets with
10 reinspection results for raisins that were reconditioned and
11 additional inspection sheets for reconditioned raisins are being
12 withheld. (Doc. 61, Reply, 5:21-25 and 6:1-11)

13 Plaintiff does not state that it is providing this as newly
14 discovered evidence, nor explains why this was not addressed in
15 the 2005 summary judgment briefs. No mention of these issues are
16 made in the 2005 Order. In addition, these are conclusory
17 statements with references to the specific portions of Lion's
18 petition to reopen proceedings in Complaint 1. It is unclear how
19 alleged collateral misstatements in other cases provides evidence
20 or shows extraordinary circumstances.

21 Plaintiff also describes certain actions allegedly
22 attributable to Government Counsel Colleen Carroll that occurred
23 in a proceeding in the U.S. Court of Federal Claims. *Lion*
24 *Raisins, Inc. v. U.S.*, 64 Fed.Cl. 536 (2005). In the
25 proceedings, the Department of Justice and USDA counsel were
26 cited for contempt for violating a protective order after
27 disclosing protected material to the ALJ in the proceedings for
28 Complaint 1. *Id.* at 544. It is not clear from a review of the

1 U.S. Court of Federal Claims decision that Colleen Carroll was
2 the attorney being cited for contempt.

3 Plaintiff also complains about the manner in which Ms.
4 Carroll allegedly presented evidence in the proceedings for
5 Complaint 1. Ms. Carroll allegedly presented evidence to support
6 USDA's claim that Lion forged the name of an inspector on three
7 USDA certificates. However she did not call a handwriting
8 expert. Lion claims it was precluded from conducting a
9 handwriting analysis which its expert later independently
10 concluded that the signature was probably authentic. Plaintiff
11 contends disclosure of the Worksheets are important for the
12 reason that Ms. Carroll is engaged in misconduct. (Doc. 61,
13 Reply, 6:24-25 and 7:1-10) There is no explanation why Ms.
14 Carroll's failure to call a handwriting expert precludes
15 Plaintiff from calling its own handwriting expert. No allegation
16 is made that Ms. Carroll improperly interfered with the ALJ
17 Judge's hearing of evidence. Also, this claim does not
18 demonstrate agency misconduct by Ms. Carroll that is related to
19 the Worksheets.

20 Plaintiff also complains of actions by Kenneth Clayton, USDA
21 Associate Administrator of the AMS. The actions stem from a 2001
22 decision in a different suit involving the same parties. In the
23 preliminary injunction decision Lion was suspended from bidding
24 on government contracts. *See Lion Raisins, Inc. v. USDA*, CIV-F-
25 01-5050 OWW DLB, *Findings of Fact and Conclusions of Law Re:*
26 *Plaintiff's Motion for Preliminary Injunction*, p. 9, 14, 26.
27 Lion challenged the suspension decision in federal court. The
28 resulting order stated that the Suspending Officer "ignored,

1 mischaracterized or minimized the numerous and good faith steps"
2 taken by Lion. *Id.* at p. 14, ¶ 56. When the case was
3 transferred to Federal Claims Court that court held that the
4 suspension decision was arbitrary and capricious. Lion cites
5 this decision to show that the failure to disclose the Worksheets
6 could be explained by Mr. Clayton's previous behavior, which the
7 2001 decision found "puzzling." Lion claims receipt of the
8 Worksheets would likely prove knowledge or constructive knowledge
9 that inspectors recorded reinspection results on Worksheets
10 without following the mandatory set aside and recording
11 procedures." (Doc. 61, Reply, p. 7:21-24) The 2001 Clayton
12 information was available to Lion before the 2005 Order issued.
13 Lion never presented this information in 2005, it is not newly
14 discovered evidence, nor does Lion provide a reason for not
15 presenting this information at that time.

16 Finally, Plaintiff Lion claims that Mr. Clayton and/or Mr.
17 Trykowski have gone to great lengths to destroy or suppress
18 evidence of agency misconduct and punish Lion. Plaintiff Lion
19 describes the alleged destruction of reinspection records, such
20 as cover sheets for Certificates that were prepared to correct
21 and supersede other Certificates and destruction or withholding
22 of relevant portions of the Ledger in violation of records
23 management regulations. (Doc. 61, Reply, p. 7:25-28 and 8:1-18)
24 But these statement are also conclusory and Lion only cites its
25 own petition to reopen the proceedings in Complaint 1, and a
26 declaration by its in-house counsel. This does not amount to
27 concrete or compelling evidence of wrongdoing to establish the
28 extraordinary circumstances for a 60(b)(6) motion.

1 Allegations of agency misconduct, including alleged
2 misconduct that was known to Plaintiff Lion at the time of the
3 2005 Order and which stems in some instances from alleged
4 misconduct as early as the 2001 decision does not suffice to
5 overcome the high bar set for a 60(b)(6) motion requiring
6 extraordinary circumstances.

7 The Ninth Circuit has not addressed at which point the FOIA
8 examination takes place on review. The main case on point comes
9 for the District Court of Columbia. See *Bonner v. U.S. Dep't of*
10 *State*, 928 F.2d 1148, 1152 (D.D.C. 1991). Two unpublished
11 opinions, one for the Ninth Circuit, following *Bonner*, and one
12 from the Northern District of California take two different
13 approaches on the issue of when a review of a FOIA request is
14 appropriate: (1) at the time of the agency decision (Ninth
15 Circuit unpublished opinion); or (2) at the time of review by the
16 court (Northern District unpublished opinion). According to the
17 District of Columbia precedent, a FOIA review is to proceed from
18 the time the agency denied the request, thus denying Lion relief
19 here. *Bonner*, 928 F.2d at 1152. It will not leave Lion without
20 recourse as the unpublished Ninth Circuit opinion notes that a
21 FOIA request can be resubmitted, which it appears Lion has done.
22 *Lynch v. Department of Treasury*, 2000 WL 123236 *3, 210 F.3d 384
23 (9th Cir. 2000).

24 Under the District of Columbia Circuit precedent, a court
25 reviewing a denial of a FOIA request must judge the agency's
26 decision as of the time the agency responded to the FOIA request,
27 not at the time of the court's review. "FOIA judicial review...,
28 while de novo, remains an assessment of the agency decision to

1 withhold a document. That decision, we hold, ordinarily must be
 2 evaluated as of the time it was made." *Bonner*, 928 F.2d at 1152.
 3 "Courts reviewing an agency's action must of necessity limit the
 4 scope of their inquiry to an appropriate time frame ... To
 5 require an agency to adjust or modify its FOIA responses on post-
 6 response occurrence could create an endless cycle of judicially
 7 mandated reprocessing." *Id.* at 1152-53. This court, USDA argues
 8 has already evaluated USDA's decision to deny the FOIA request in
 9 light the circumstances existing at the time, granting summary
 10 judgment in favor of USDA on the grounds that the disclosure of
 11 the Worksheets could reasonably be expected to interfere with law
 12 enforcement proceedings. See Doc. 47, Judgment, p. 21. No Ninth
 13 Circuit case has explicitly adopted *Bonner's* holding.

14 The Ninth Circuit Court of Appeals *unpublished opinion* held
 15 the following with regard to reviewing FOIA requests:

16 Similarly, the determination as to whether a release of
 17 records could reasonably be expected to interfere with
 18 enforcement proceedings is to be made as of the time
 19 the agency decided to withhold the documents. See
 20 *Bonner v. United States Dep't of State*, 928 F.2d 1148,
 1152 (D.C.Cir.1991); *Institute for Justice and Human*
Rights v. Executive Office of the U.S. Attorney, No. C
 96- 1469 FMS, 1998 WL 164965, at *3 (N.D.Cal. Mar. 18,
 1998).

21 ...
 22 If Lynch now believes that, three years after the fire,
 23 no proceeding is currently pending or contemplated, his
 24 recourse is to resubmit an FOIA request for the records
 25 at this time.

26 *Lynch v. Department of Treasury*, 2000 WL 123236 *3, 210 F.3d 384
 27 (9th Cir. 2000). Plaintiff Lion seeks a review of the FOIA
 28 decision by the agency anew, and not at the time of the denial,
 which has been finally decided. Plaintiff Lion has not presented
 any evidence or argument on the original denial of its FOIA

1 request. It instead seeks to have the court review the FOIA
2 denial in light of the present circumstances which the law does
3 not support. See *Bonner v. U.S. Dep't of State*, 928 F.2d 1148,
4 1152 (D.D.C. 1991).

5 The Northern District of California court in an unpublished
6 opinion declined to follow *Bonner*:

7 Plaintiff argues that even if the government properly
8 withheld the documents in 1994, its reason for the
9 exemption is no longer valid. This position raises two
10 questions: whether it is proper for the Court to
11 analyze the present validity of the claimed exemption,
and whether the result would be different if such an
analysis is performed. The Court answers the first
question in the affirmative and the second in the
negative.

12 *Institute for Justice and Human Rights v. Executive Office of the*
13 *U.S. Attorney*, No. C 96-1469 FMS, 1998 WL 164965 *4 (N.D.Cal. May
14 18, 1998). "The termination of law enforcement proceedings that
15 formed the basis of an exemption would be an equally apparent and
16 substantial change in circumstances. Accordingly, the government
17 should be required to justify its withholdings based on present
18 circumstances in this case." *Id.* The Northern District of
19 California court found the proceedings to still be open and
20 declined to find changed circumstances, thereby it did not
21 mandate a different result but it reviewed the FOIA request for
22 the present circumstances. *Id.*

23 Even if *arguendo*, the Northern District of California
24 approach is taken, the proceedings here are ongoing, preventing a
25 decision to release the requested records. USDA contends through
26 its Declaration by Director David W. Trykowski "that the basis
27 for withholding worksheets remains valid, because while the
28 enforcement proceedings have progressed, those proceedings are

1 not completed, and release of the requested records could still
2 interfere with AMS' enforcement efforts. Declaration of David W.
3 Trykowski in Support of Defendant's Opposition to Motion for
4 Relief from Judgment ("Trykowski Decl.") ¶ 6. Under Exemption
5 7(A), an agency "need only make a general showing that disclosure
6 of its investigatory records would interfere with its enforcement
7 proceedings." *Lewis v. I.R.S.*, 823 F.2d 375, 380 (9th Cir.
8 1987). USDA contends that granting Lion access to these
9 worksheets would provide Lion with an opportunity to create
10 exculpatory evidence in pending and "prospective" administrative
11 proceedings. See *Manna v. United States Dep't of Justice*, 51
12 F.3d 1158, 1164-65 (3d Cir. 1995) (Exemption 7(A) covers both
13 pending and "prospective" criminal proceedings). Plaintiff Lion
14 is also not without recourse, as Lion can resubmit a FOIA
15 request.

16 "The court is entitled to accept the credibility of the
17 affidavits [of the government], so long as it has no reason to
18 question the good faith of the agency." *Cox v. United States*
19 *Dep't of Justice*, 576 F.2d 1302, 1312 (8th Cir. 1978). "In
20 evaluating a claim for exemption, a district court must accord
21 'substantial weight' to [agency] affidavits, provided the
22 justifications for nondisclosure 'are not controverted by
23 contrary evidence in the record or by evidence of [agency] bad
24 faith.'" *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996)
25 (quoting *Hunt v. C.I.A.*, 981 F.2d 1116, 1119 (9th Cir. 1992)).

26 Lion disagrees and contends through its in-house corporate
27 counsel, Wesley T. Green, that the evidence has concluded on
28 Complaint 1 and Complaint 3. See Declaration of Wesley T. Green

1 in Support of Plaintiff's Motion for Relief from Judgment ("Green
2 Decl.") ¶¶ 1-2. Lion however has filed petitions to reopen
3 hearings in two of the proceedings and the third proceeding
4 (Complaint 2) has not been heard and is awaiting reassignment to
5 an ALJ. Trykowski Decl. ¶ 8. USDA contends that the ALJ has not
6 issued a decision on Complaint 1, even though Lion has petitioned
7 to reopen the hearing. If the ALJ grants Lion's motion, USDA
8 argues that the ALJ will hear further testimony and evidence.
9 Trykowski Decl. ¶ 7. As to Complaint 3, the ALJ dismissed more
10 than half the counts and issued a decision and order finding on
11 33 occasions Lion had engaged in a "pattern of misrepresentation
12 or deceptive or fraudulent practices in connection with the use
13 of official inspection certificate [and/or] inspection results."
14 The ALJ also barred Lion from receiving inspection services for a
15 period of five years. Lion has petitioned to reopen that
16 hearing. AMS has also asked the Judicial Officer to review the
17 ALJ's decision that dismissed half the counts in the Complaint 3
18 proceedings. USDA contends that if the ALJ erred in dismissing
19 those counts, they could be remanded for additional proceedings.
20 *Id.* at ¶ 9.

21 Rule 60(b)(6) does not afford relief.

22 C. Request for Modification of Order

23 Lion also requests under its motion for relief from judgment
24 an order from the Court modifying the 2005 Order to require the
25 USDA to maintain originals of the requested worksheets pending
26 resolution of the new FOIA request and judicial review thereon.
27 "'Rule 60(b) is available only to set aside a prior judgment or
28 order; courts may not use Rule 60(b) to grant affirmative relief

1 in addition to the relief contained in the prior order or
2 judgment.'" *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir.
3 2007) (citing 12 Moore's Federal Practice § 60.25 (Matthew Bender
4 3d 2004)); *see also United States v. \$119,980*, 680 F.2d 106 (11th
5 Cir. 1982). Plaintiff cannot seek an order modifying the 2005
6 Order to encompass a request related to a new FOIA request. The
7 new FOIA request was not addressed by the October 20, 2005
8 Summary Judgment Order. Lion should be bringing a separate
9 request under its new FOIA request not under the October 20, 2005
10 Summary Judgment Order.

11 CONCLUSION

12 For the reasons set forth above, Plaintiff's 60(b)(5) and
13 60(b)(6) motion for relief from judgment is DENIED.

14
15 IT IS SO ORDERED.

16 Dated: August 13, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE